Filed 11/4/10 P. v. Segura CA3

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. IGNACIO DAVID SEGURA, Defendant and Appellant.	C064073 (Super. Ct. No. CM026755)

On March 10, 2007, defendant Ignacio David Segura drove his Dodge Ram pickup truck into oncoming traffic and collided head-on with the victim's Toyota pickup truck, resulting in the victim's death. Defendant had a blood-alcohol content of 0.08 percent. Defendant entered a negotiated no contest plea to vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (b)) in exchange for dismissal of the remaining counts with a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754.

The court suspended imposition of sentence and granted formal probation for a term of five years subject to certain terms and conditions including that defendant attend an

Alcoholics and Narcotics Anonymous program meeting at least once a day, maintain an attendance log, obtain a sponsor, and work the steps.

Defendant admitted that he violated probation by failing to attend and provide attendance logs for the 12-step programs and by failing to appear in court for a probation review on September 9, 2009. On November 25, 2009, the court declined to reinstate defendant on probation and sentenced him to state prison for the midterm of two years.

On December 21, 2009, defendant filed a request that the trial court recall the sentence and grant his application for release pending appeal. On December 23, 2009, the trial court denied defendant's request.

On January 15, 2010, defendant filed a notice of appeal from the judgment on November 25, 2009. The trial court denied defendant's request for a certificate of probable cause (Pen. Code, § 1237.5).

Defendant contends the trial court abused its discretion in revoking probation and in denying his request to recall the sentence. We will affirm the judgment.

FACTS AND PROCEDURAL HISTORY

At the original sentencing hearing on April 10, 2008, the prosecutor opposed a grant of probation, noting defendant's lies to arresting officers, including that he had not been drinking. In granting probation, the court ordered defendant to attend a substance abuse treatment program every day and that it would not accept "any" failure to attend every day. Defendant stated

that he understood. Probation was modified later to require defendant to attend three 12-step program meetings a week.

Although defendant attended and had favorable progress reports for several months, probation reported on May 26, 2009, that defendant missed two appointments on April 13, 2009, and April 27, 2009, had no sponsor in the 12-step program, and had stopped working on his 12 steps. Defendant confirmed that he had no sponsor and had stopped working on his steps. The trial court stated, "[T]hat's not acceptable, that's not going to work given the nature of this offense, what's at stake for you and what's at stake for the community. That's not something that can happen and continue on probation. So by not having a sponsor and not working your 12 steps and being in violation of the [High Intensity DUI Enforcement] criteria, you're telling this Court that you don't want to be on probation. That's how I view it."

The prosecutor stated that he would not seek a violation of probation if defendant provided documentation in three or four days which explained why he missed two appointments; if he failed to do so and failed to "fix everything," the prosecutor stated that defendant would "be a danger to the community and probably have to go to prison." Defendant was ordered to obtain a sponsor, to resume his 12 steps and to submit proof of the same, and to provide the documentation to probation by June 5, 2009, to explain his absences. If he failed to do so, the court warned defendant that it would not continue him on probation because of public safety concerns.

Defendant provided documentation for one of the missed appointments, but in an untimely manner, and did not provide documentation for the other missed appointment.

On June 16, 2009, the court commented on defendant's failure to provide documentation for one of his missed appointments: "The issue is you know what the rules are. You were given another chance. You came to court and were given yet another chance, and you still haven't done that. It's two months later. I don't accept that. You've already been given a last chance. [¶] . . . [¶] . . . There's no violation pending right now for the other missed meeting. Whether that will happen or not, I don't know, but you cannot miss meetings unless you provide the appropriate documents by the next meeting or you'll find yourself going to prison. Rules are there for a reason. It's so that you show up so that we can help you and it's so that we can verify your honesty. When you don't give us the documents, we question your honesty."

At the probation review hearing on July 14, 2009, defendant had made favorable progress but had a "panic moment" when he initially could not find his attendance logs. The court warned that it would be a violation if he did not bring them. Defendant was still on step one which the court viewed as being unsatisfactory in that he had been on step one since March.

On September 9, 2009, defendant failed to appear in court for his probation review. The record on appeal does not include a reporter's transcript of this hearing.

An oral petition for revocation of probation on October 7, 2009, alleged that defendant failed to attend and provide attendance logs for the 12-step programs and failed to appear on September 9, 2009. The record on appeal does not include a reporter's transcript of the October 7, 2009 hearing.

On October 14, 2009, defense counsel stated that defendant was "prepared to admit the allegations. He believes, however, that his medical condition as a result of his operation would have been a justification for failure to attend, the logs. I explained to him that he would have been required to at least make a good-faith attempt to go, and he did not. So I believe it would constitute a violation." Defendant admitted the allegations that he did not have "any logs showing attendance at 12-step meetings since July of 2009" and that he "failed to appear in court on September 9th, 2009, without permission of the Court." The court found defendant to be in violation of probation.

On November 25, 2009, in denying defendant's application for continued probation, the trial court cited the nature of the offense and found that defendant had tried but failed on probation and was not remorseful. The court imposed the midterm of two years in state prison.

On December 21, 2009, defendant filed a request that the trial court recall the sentence and grant his application for release pending appeal. At a hearing on December 23, 2009, defense counsel cited defendant's medical condition as the reason for his request. The trial court stated it had been

aware of defendant's medical condition. Also, defense counsel claimed that defendant denied having received notice of a hearing date, which the trial court rejected since the notice was sent to defendant's last known address and he had always received his mail. Defense counsel also claimed defendant's probation violations were of a minimal nature. The prosecutor argued none of the conditions in Penal Code section 1170, subdivision (d) applied. The prosecutor argued against bail pending appeal because defendant had not shown by clear and convincing evidence that he was not a flight risk. The trial court determined that defendant did not have a life-threatening problem and noted that defendant had received "warning, after warning, after warning" about complying with probation conditions. The trial court denied defendant's request.

DISCUSSION

Defendant argues that his two violations of probation were "too minimal" to justify revoking probation and imposing a prison sentence. He also claims that a violation of probation could not be based on his failure to appear in court on September 9, 2009, because there was no evidence he knew of the court date. He contends that the trial court also abused its discretion in failing to recall the sentence. We reject defendant's contentions.

I

Initially, we consider the People's claim that defendant is barred from challenging the validity of his admission that he

failed to appear because he did not obtain a certificate of probable cause (Pen. Code, § 1237.5).

Penal Code section 1237.5 bars an appeal from a revocation of probation following an admission of violation, except where the defendant has filed a written statement showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings, and the trial court has granted a certificate of probable cause. (See also Cal. Rules of Court, rule 8.304(b)(1).)

Here, defendant is challenging the validity of his admission that he violated probation, the trial court's sentencing choice, and the trial court's denial of his request to recall the sentence. Even if defendant had obtained a certificate of probable cause, defendant's challenge to the evidence supporting the finding that he failed to appear would not be cognizable on appeal. He admitted the allegations in the petition for revocation of probation, thus, defendant admitted that he failed to appear. Implicit in the allegation and admission is that his failure to appear was willful since a nonwillful violation is not a violation of probation. (See *People v. Zaring* (1992) 8 Cal.App.4th 362, 375, 379.) Defendant's admission conceded that the prosecution could prove the allegation, including that the failure to appear was a willful and knowing violation of probation. (*People v. Chadd* (1981) 28 Cal.3d 739, 748 [guilty plea].) Defendant's admission of a violation stands.

II

No certificate of probable cause is required here in order for defendant to challenge the trial court's denial of continued probation and imposition of a state prison sentence.[1] (Cal. Rules of Court, rule 8.304(b)(4)(B); *People v. Cole* (2001) 88 Cal.App.4th 850, 863-864.) "'Probation is an act of clemency . . . .'" (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.) The court may modify, revoke, or terminate probation if the probationer has violated any term or condition of probation "if the interests of justice so require." (Pen. Code, § 1203.2, subd. (b).) In considering whether to revoke probation, the court's inquiry is directed "to the probationer's performance on probation." (*People v. Beaudrie* (1983) 147 Cal.App.3d 686, 691.) "Thus the focus is (1) did the probationer violate the conditions of his probation and, if so,

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[1] Defendant's attorney prepared a notice of appeal from the judgment of "November 25, 2009," which was the hearing where the trial court sentenced defendant to state prison. Defendant's attorney checked the box that the appeal challenged the validity of defendant's admission. He also checked the box that the appeal challenged the trial court's denial of his request to recall the sentence. Defendant's attorney did not check the box that the appeal was "based on the sentence or other matters occurring after the plea that do not affect the validity of the plea." Defendant's new attorney on appeal challenges the denial of continued probation and imposition of state prison, which occurred on November 25, 2009. The rules of court require liberal construction of a notice of appeal and the notice is sufficient if it identifies the judgment or order appealed from. (Cal. Rules of Court, rule 8.304(a)(4).) We will construe defendant's notice of appeal as liberally as possible to include his appeal from his sentence to state prison, the judgment of November 25, 2009.

(2) what does such an action portend for future conduct?" (*Ibid.*) The trial court is vested with broad discretion in determining whether to reinstate probation following revocation of probation (*People v. Jones* (1990) 224 Cal.App.3d 1309, 1315), and the trial court's decision to revoke probation is reviewed for an abuse of discretion. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 443 (*Rodriguez*); *People v. Downey* (2000) 82 Cal.App.4th 899, 909-910.) *Rodriguez* held "' . . . only in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation. . . .'" (*Rodriguez, supra,* at. p. 443.)

The trial court did not abuse its discretion in revoking probation and imposing the midterm of two years. Contrary to defendant's claim, the nature of his violations of probation were not minor. The revocation occurred because of his admitted failure to appear in court on one occasion and his admitted failure to provide attendance logs for the 12-step programs for at least two months. In view of the fact that he had been granted probation for the offense of vehicular manslaughter while intoxicated, the violations were serious, especially his failure to show that he had been attending the 12-step programs. Although the revocation occurred because of these violations, he had demonstrated an inability to comply with the requirements of probation, having missed two appointments with probation, failing to provide documentation justifying one of the missed appointments, and in May 2009, having no sponsor and failing to

work on his 12-step programs. As the trial court warned, defendant's continued failure raised public safety concerns.

The court showed clemency to defendant when it granted probation, and again when defendant failed to provide documentation for one of the missed April 2009 appointments. Clemency was no longer justified. This is not a "'very extreme'" case warranting appellate court interference. (*Rodriguez, supra,* 51 Cal.3d at p. 443.)

III

"[Penal Code] [s]ection 1170 subdivision (d) does not confer standing on a defendant to initiate a motion to recall a sentence. Instead, that section permits a court to recall a sentence 'on its *own* motion.'" (*People v. Pritchett* (1993) 20 Cal.App.4th 190, 193.) "Consequently, the courts have uniformly held that an order *denying* a defendant's request to resentence pursuant to [Penal Code] section 1170[,] subdivision (d) is not appealable as an order affecting the substantial rights of the party. This is because the defendant has no right to request such an order in the first instance; consequently, his 'substantial rights' cannot be affected by an order denying that which he had no right to request." (*Pritchett, supra*, 20 Cal.App.4th at p. 194.) We will dismiss defendant's appeal from the denial of his request to recall the sentence as an appeal from a nonappealable order.

IV

The trial court awarded 167 actual days and 82 conduct days for a total of 249 days of presentence custody credits.

Pursuant to this court's miscellaneous order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue of whether amendments to Penal Code section 4019 apply retroactively to his pending appeal and entitle him to additional presentence credits. We conclude that the amendments do apply to all appeals pending as of January 25, 2010. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 [amendment to statute lessening punishment for crime applies "to acts committed before its passage provided the judgment convicting the defendant of the act is not final"]; *People v. Doganiere* (1978) 86 Cal.App.3d 237 [applying *Estrada* to amendment involving conduct credits]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying the rule of *Estrada* to amendment allowing award of custody credits].) Defendant is not among the prisoners excepted from the additional accrual of credit. (Pen. Code, § 4019, subds. (b), (c).) Having served 167 actual days, defendant is entitled to 166 conduct days for a total of 333 days of presentence custody credit.

While this appeal was pending, the Legislature again amended Penal Code section 4019, but expressly stated the changes to jail inmate credits apply only to crimes committed on or after the effective date of the legislation, September 28, 2010. (Stats. 2009-2010, ch. 426, § 2 [Sen. Bill No. 76].)

DISPOSITION

Defendant's appeal from the trial court's order denying his request to recall the sentence is dismissed. The judgment is modified to provide 166 conduct days for a total of 333 days of

presentence custody credit. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment accordingly and to forward a certified copy to the Department of Corrections and Rehabilitation.

SIMS, J.

We concur:

SCOTLAND, Acting P. J.*

HULL, J.

* Retired Presiding Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.